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IN THE

SUPREME COURT
OF THE UNITED STATES

October Term, 1974
No. [redacted]

PAUL KERN IMBLER,

Petitioner,

v.

RICHARD PACHTMAN,
Deputy District Attorney,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR
THE NINTH CIRCUIT

BRIEF FOR THE NATIONAL DISTRICT ATTORNEYS ASSOCIATION AS AMICUS CURIAE

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IN THE
SUPREME COURT
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October Term, 1974
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PAUL KERN IMBLER,
Petitioner,

v.

RICHARD PACHTMAN,
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Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR
THE NINTH CIRCUIT

BRIEF FOR THE NATIONAL DISTRICT ATTORNEYS ASSOCIATION AS AMICUS CURIAE

This brief is filed with this Court pursuant to the authority found in Rule 42, Paragraph 2 of the Supreme Court Rules.[1/]

INTEREST OF AMICUS CURIAE

The National District Attorneys Association is a nonprofit, nonpolitical, tax

1. Written consent of the parties has been obtained and with a cover letter is enclosed as part of the package containing this brief.

exempt corporation composed of approximately 6,000 members representing all 50 states. The purposes of the National District Attorneys Association are, inter alia, to improve and to facilitate the administration of justice in the United States and to promote the study of law in legal institutions.

To effectuate these aims the National District Attorneys Association for many years has utilized an amicus curiae committee to file briefs in cases of national importance in the United States Supreme Court. We seek to make known the views of prosecutors in the United States and to bring before this Court their position on matters affecting the discharge of the duties of prosecutors in their everyday work.

Crime in the United States has grown to such an extent that it is only through vigorous prosecution that the criminal justice system can help stem the tide of those that would undermine our society. If a prosecutor must look over his shoulder in each case in which he is involved in order to protect himself and his family from the possibility and uncertainties of a civil law suit, pursuant

to 42 USC section 1983[2], because of actions he has taken in the course of prosecuting persons charged with crimes, the effectiveness of the criminal justice system may not only be reduced but it is quite possible that in many instances vigorous prosecution may not even be instituted.

The case at bar raises the foregoing issues and is therefore of utmost concern to the prosecutors of the United States. We discuss our views more fully below.

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2. 42 USC § 1983 provides: "Every person, who under color of any statute, ordinance, regulation, custom or usage, of any State or Territory, subjects or causes to be subjected any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

QUESTION PRESENTED

SHOULD A PROSECUTING ATTORNEY BE SUBJECTED TO THE THREAT OF PERSONAL CIVIL SUIT PURSUANT TO 42 USC § 1983[3] ARISING FROM EVERY ACTION TAKEN BY HIM IN THE COURSE OF HIS DUTIES?

SUMMARY OF ARGUMENT

An independent prosecutor is a necessity in our society today. The volume of cases processed by prosecutors throughout the United States and the time needed to prepare individual cases is such that a prosecutor might be concerned that many years after the case before the court is concluded someone may look over the prosecutor's shoulder and conclude, based on factors which the prosecutor no longer remembers, that the prosecutor either knew or should have known that he deprived the defendant of a fair trial.

Judges enjoy judicial immunity in order to insulate the system of justice (hereinafter designated judicial process) from outside influence in the performance of its function. Judicial immunity exists

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3. It should be noted that federal civil rights actions may also be brought in state courts; see, for example: California (Brown v. Pitchess, 13 Cal.3d 518, 531 P.2d 772 [1975]) and Illinois (Alberty v. Daniel, _____Ill._____, 323 N.E.2d 110 [1974]).

regardless of the type of mistake or motive of the judge in violating civil rights of a defendant. Similarly, in order for a prosecutor to do his job effectively within the judicial system and to protect the fair and impartial operation of that system, the prosecutor must remain as independent as possible, uninfluenced by the threat of civil suit.

It is said that all attorneys are officers of the court and as such must deal honestly with the court before which they appear and must abide by a certain code of eithics. Nevertheless, a prosecutor is in a unique situation since he is not only an advocate for a particular position in a case, i.e., representing the People, but he also occupies a quasi-judicial position in that he not only initiates criminal prosecutions, but also must process these prosecutions with an eye towards justice rather than conviction.

Any tampering with the immunity accorded to prosecutors as participants in the judicial process can only impair the functioning of that process since prosecutors will feel compelled to second guess themselves before and during the processing of cases.

We submit public policy favors personal immunity for prosecutors acting in the course of their employment.

ARGUMENT

IMMUNITY SHOULD BE ACCORDED A PROSECUTOR FOR ACTIONS TAKEN BY HIM IN THE COURSE OF TRIAL IN A CRIMINAL CASE AND HE SHOULD NOT BE LIABLE UNDER 42 USC § 1983 FOR SUCH CONDUCT

I

THE PRACTICAL EFFECTS OF PROSECUTORIAL IMMUNITY ARE CONSISTENT WITH PUBLIC POLICY

The basic issue is whether a prosecuting attorney, herein, a deputy district attorney for the County of Los Angeles, State of California, should be accorded immunity when faced with a civil rights lawsuit in which the plaintiff alleges that the deputy district attorney violated plaintiff's civil rights through the knowing use of perjured testimony in obtaining the conviction or by negligently using perjured testimony when the deputy district attorney should have known of its perjured character.

In examining the practical effects of civil rights lawsuits against a prosecutor we shall first consider the dual role of the prosecutor in the judicial system as an advocate who exercises discretionary power and who initiates and processes cases through the judicial system in the interest of justice.

As stated by Chief Justice Burger, when he was still a member of the Court of Appeal in Newman v. United States, 382 F.2d 479, 481 (D.C. Cir. 1967):

> "An attorney for the United States, as any other attorney, however, appears in a dual role. He is at once an officer of the court and the agent and attorney for a client; in the first capacity he is responsible to the Court for the manner of his conduct of a case, i.e., his demeanor, deportment and ethical conduct; but in his second capacity, as agent and attorney for the Executive, he is responsible to his principal and the courts have no power over the exercise of his discretion or his motives as they relate to the execution of his duty within the framework of his professional employment. This dual role is perhaps best illustrated as follows:
>
> "'Although as a member of the bar, the attorney for the United States is an officer of the court, he is nevertheless an executive official of the Government and it is as an officer of the executive department that he exercises a discretion as to whether or not there shall be a prosecution in a particular

> case. It follows, as an incident of the constitutional separation of powers, that the courts are not to interfere with the free exercise of the discretionary power of the attorneys of the United States in their control over criminal prosecutions.'

"United States v. Cox, supra note 4, 342 F.2d at 171."

Surely the imposition by the legislative branch of the government of liability upon a prosecutor pursuant to 42 USC § 1983, if not deemed an unconstitutional infringement upon the doctrine of separation of powers, must nevertheless be deemed as infringing upon that doctrine since, as we shall demonstrate herein, it will inhibit the functioning of the prosecutor, a member of the executive branch of government.

We shall conclude this brief by examining the effect that the failure to grant prosecutorial immunity in such civil rights actions will have on the functioning of the judicial process.

A

ROLE OF THE PROSECUTOR IN THE JUDICIAL PROCESS

1. The Prosecutorial Function is Discretionary

The prosecutor stands at a critical point in the American criminal justice system.

He functions at the hub of the system, working directly with the police, the courts, the people. The duty of the prosecutor is to "seek justice."[4] Although an advocate operating within an adversary system, he is obliged to protect the innocent as well as convict the guilty, to guard the rights of the accused as well as enforce the rights of the public:[5]

> "The prosecutor has a dual role which reflects in a sense the ambivalence of public attitudes on law enforcement and is the source of some difficulties. On the one hand, the prosecutor is the leader of law enforcement in the community. He is expected to participate actively in marshaling society's resources against the threat of crime. When a crises in the enforcement of criminal law arises in the community, the public press and others clamor for a 'war against crime' and he may be drawn into the maelstrom of political controversy by the demand that he 'stamp out the criminals.' He

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4. ABA STANDARDS RELATING TO THE PROSECUTION FUNCTION AND THE DEFENSE FUNCTION, THE PROSECUTION FUNCTION, Section 1.1(c). (Approved Draft, 1971) [hereinafter cited as ABA STANDARDS.]

5. ABA CODE OF PROFESSIONAL RESPONSIBILITY EC 7-13 (Final Draft, 1969) [hereinafter cited as ABA CODE]; United States v. Kline, 221 F. Supp. 776 (D. Minn. 1963).

is called upon to make public statements, to propose legislative reforms, or to direct the energies of the law enforcement machinery of the community. On the other hand, the office demands and on sober thought the public expects, that the prosecutor will respect the rights of persons accused of crime. Our nation began with resistance to oppressive official conduct and our traditions, embodied in the national and state constitutions, demand that the prosecutor accord basic fairness to all persons. Because of the power he wields, we impose on him a special duty to protect the innocent and to safeguard the rights guaranteed to all, including those who may be guilty. The conflicting demands on a prosecutor may exert pressures on him which his sense of fairness as a lawyer rejects. Both his public responsibilities as well as his obligations as a member of the bar require that he be something more than a partisan advocate intent on winning cases."[6]

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6. ABA STANDARDS, THE PROSECUTION FUNCTION, Introduction, pp. 19-20.

In this role of quasi-judicial "minister of justice",[7] the American prosecutor exercises a vast amount of discretion.[8] Prosecutorial discretionary power in criminal proceedings arises not by statute but from the Common Law.[9] Underlying this immunity is a recognition of

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7. See the Commentary to ABA STANDARDS, PROSECUTION FUNCTION, Section 1.1.

8. Various commentators have advanced the following definitions of "discretion" in this context: "an authority conferred by law to act in certain conditions or situations, in accordance with the official's or the official agencies' own considered judgment and conscience," La Fave, The Prosecutor's Discretion in the United States, 18 Am. J. Comp. L. 532 n. 1. (1970); Professor Davis posits that a "public officer has discretion whenever the effective limits on his power leave him free to make a choice among possible courses of action," K. Davis, DISCRETIONARY JUSTICE 4 (1969) [hereinafter cited as Davis]; See generally Pound, Discretion, Dispensation and Mitigation; The Problem of the Individual Special Case, 35 N.Y.U. L.Rev. 925 (1960); Baker & DeLong, The Prosecuting Attorney: The Process of Prosecution, 26 J. Crim. L. & Crim. 647 (1935); Kaplan, The Prosecutorial Discretion--A Comment, 60 Nw. U. L.Rev. 174 (1965).

9. At Common Law the prosecuting attorney had absolute control of the criminal prosecution. See United States v. Thompson, 251 U.S. 407; 40 S.Ct. 289 (1920); Confiscation Cases, 7 Wall 454, 19 L.Ed. 196 (1868); United States v. Brokaw, 60 F.Supp. 100 (S.D. Ill. 1945); Fay v. Miller, 183 F.2d 986 (D.C. Cir. 1950).

the need for leniency in particular cases,[10] a flexible procedure necessary to effectuate that end, and adherence to the theories of criminal law which are aimed to some degree at societal purposes other than crime prevention.[11] Implicit in the attitude of the courts is a basic recognition that the nature of the decision to process criminal cases requires that the process be discretionary with the prosecutor for the decision to prosecute involves a delicate weighing of a myriad of subjective and objective factors:

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10. Two needs are apparent: The first is the need on the part of the public and the courts for personalized justice, "rather than literalistic adherence" to laws. L. Miller, DOUBLE JEOPARDY AND THE FEDERAL SYSTEM, 118 (1968). See LaFave, supra, note 16, at 534 (1970); Silkenat, Limitations on Prosecutor's Discretionary Power to Initiate Criminal Suits: Movement Toward a New Era, 5 Ottawa L.Rev. 104, at 107 (1971). The second is the desire by prosecutors that their function not appear to be one of "persecutors", Ploscowe & Spiero, The Prosecuting Attorney's Office and the Central of Organized Crime, MANUAL FOR PROSECUTING ATTORNEYS, at 317; F. Miller, PROSECUTION: THE DECISION TO CHARGE A SUSPECT WITH A CRIME 187 (1969).

11. Justice Breitel favors lenient discretion, a discretionary power which would "ameliorate or avoid the effective application of the literal criminal code." Breitel, Controls in Criminal Law Enforcement, 27 U. Chi. L.Rev. 427, at 430 (1960).

> "[D]iscretionary judgment is the product of the inevitable need for mediation between generally formulated laws and the human values contained in the varieties of particular circumstances in which the law is technically violated."[12]

In Pugach v. Klein, the court recognized the delicate nature of the decision to prosecute:

> "Surely it is for the United States Attorney to decide whether the public interest is better served by prosecuting or declining to prosecute . . . the likelihood of conviction . . . the degree of criminality, the weight of the evidence, the credibility of witnesses, precedent, policy, the climate of public opinion, timing, gravity of the offense . . .
>
> "Still other factors are the relative importance of the offense compared with competing demands of other cases on the time and resources of investigation, prosecution and trial. All of these numerous other intangible and unponderable factors must be carefully weighed and considered by the United States Attorney in deciding whether or not to

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12. Kadish, Legal Norm and Discretion in the Police and Sentencing Process, 75 Harv. L.Rev. 904, at 913 (1969).

prosecute.

"All of these considerations point up the wisdom of vesting broad discretion in the United States Attorney. The federal courts are powerless to interfere with his discretionary power. The Court cannot compel him to prosecute a complaint or even an indictment, whatever his reasons for not acting. The remedy for dereliction of his duty lies, not with the courts, but, with the executive branch of our government and ultimately with the people."[13]

Although the prosecutor's discretion is most pronounced with respect to the initiation and discontinuance of criminal proceedings, certainly the prosecutor exercises a vast amount of discretion in the manner of prosecution (i.e., order and examination of witnesses, motions, strategy, etc.) once prosecution has been initiated. The nature of and considerations underlying prosecutorial discretion in initiation and discontinuance decisions apply equally to the prosecutor's discretionary decisions throughout prosecution. Indeed, at the time the prosecutor considers filing a case he

13. Pugach v. Klein, 193 F.Supp. 630, at 634 (S.D.N.Y. 1961).

must consider all aspects of it, i.e., the effect and weight of the evidence to be presented (including the witnesses he will call to testify and the nature of their testimony) and whether such evidence would be sufficient, beyond a reasonable doubt, to convict. (See, for example, ABA STANDARDS §§ 3.9(a) and (b).) The role of the prosecutor must thus be deemed as discretionary throughout the processing of a case in the judicial system. In essence, the discretionary nature of the charging process requires that decisions which the prosecution makes thereafter, because they are an integral part of the charging process, also must be within the discretion of the prosecutor.[14]

14. Similarly, it should be noted that the prosecutor's discretion is not limited to criminal proceedings, since civil remedies (for example, civil consumer fraud actions, diversion of narcotic offenders, anti-trust suits) are often part of a prosecutor's arsenal.

2. The Prosecutor's Function Is Exercised In The Interests Of Justice

The initiation and prosecution of a criminal case[15] is a function delegated

15. While immunity derived from the processing of cases through the judicial system is not necessarily limited to criminal cases, we consider only such cases in this brief since that is the context in which the matter sub judice arose.

by the People solely to a prosecutor,[16] who thereby controls the flow of cases into the criminal justice system. Thus anything which affects the exercise of discretion by a prosecutor must necessarily affect the entire judicial process. As stated in Pearson v. Reed, 44 P.2d 592 (1935) [6 Cal.App.2d 277]:

> "A prosecutor is called upon to determine, upon evidence submitted to him, whether a criminal offense has been committed by the person accused--exactly the same question that is presented to

16. Most states provide for this unique function by constitutional provisions or statutes such as the following:

Article VI, section 20 of the California Constitution provides: "The style of all process shall be 'The people of the State of California,' and all prosecutions shall be conducted in their name and by their authority." (Emphasis added.)

"The district attorney is the public prosecutor. He shall attend the courts, and conduct on behalf of the people all prosecutions for public offenses." (Calif. Gov. Code § 26500; emphasis added.)

Illinois Revised Statutes, Chapter 14, § 5 (1969) provides that the state's attorney shall:

"[C]ommence and prosecute all actions, suits, indictments and prosecutions, civil and criminal, in any court of record in his country, in which the people of the state or county, may be concerned." (Emphasis added.)

a court or jury upon trial. His decision is no less judicial in character if it be erroneous or swayed by prejudice or malice. It does not matter whether the evidence before him be much or little or whether he hears all or only some of it. His authority to investigate the facts before acting is unlimited and the matter rests in his own discretion. He is a quasi- judicial officer and he is also an executive officer." (44 P.2d at 596-597 [6 Cal. App.2d at 286]).

Undoubtedly because of the broad consequences of the exercise of discretion by a prosecutor, certain limitations and sanctions have been imposed upon his office which are unique to his role as an advocate in the judicial process.

As already noted,[17] it is the prosecutor's duty not only to convict those charged with crimes against society but also to see that all defendants receive a fair trial and are not convicted by fowl means. If evidence which supports the acquittal of the defendant becomes known to a prosecuting attorney such evidence must be disclosed to the defense.

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17. See pp. 9-10, supra.

That is the law of California where Richard Pachtman is a career civil servant as a deputy district attorney in Los Angeles County. (See People v. Ruthford, _____Cal.3d_____, Crim. 18431, decided by the California Supreme Court on May 21, 1975; California Business and Professions Code sections 6076 et seq; ABA Standards § 3.11.) When a prosecutor withholds evidence favorable to the defense[18] or engages in misconduct at trial to the prejudice of a particular defendant,[19] his case against such defendant is dismissed or reversed on appeal. Indeed, not only may an attorney be subject to severe disciplinary action through the state bar association[20] if he attempts to benefit his client through the use of

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18. Brady v. Maryland, 373 U.S. 83; 83 S.Ct. 1194; 10 L.Ed.2d 215 (1962); Giles v. Maryland, 386 U.S. 66; 87 S.Ct. 793; 17 L.Ed. 2d 737 (1967); Miller v. Pate, 386 U.S. 1; 87 S.Ct. 785; 17 L.Ed.2d 690 (1967).

19. Giglio v. United States, 405 U.S. 150; 92 S.Ct. 764; 31 L.Ed.2d 104 (1972).

20. For example, California Business and Professions Code sections 6076 et seq.

perjured testimony but he may also be subject to criminal prosecution if he willfully procures perjured testimony. (In re Branch, 70 Cal.2d 200, 210-211; 449 P.2d 174 [1969]; see ABA STANDARDS, page 23.)

It is thus clear that the prosecutor has a duty to exercise his discretion in the interests of justice because of the unique quasi-judicial function which he performs in the judicial process. As stated in the ABA STANDARDS, p. 20:

> "Because of the power he wields, we impose on him a special duty to protect the innocent and to safeguard the rights guaranteed to all, including those who may be guilty. The conflicting demands on a prosecutor may exert pressures on him which his sence of fairness as a lawyer rejects. Both his public responsibilities as well as his obligations as a member of the bar require that he be something more than a partisan advocate intent on winning cases."

B.

THE LACK OF PROSECUTORIAL IMMUNITY WILL RESULT IN ADVERSE CONSEQUENCES FOR THE JUDICIAL PROCESS

1. Harmful Effect on the Independence of the Prosecutor.

In referring to the need for prosecutorial immunity, the eminent jurist Learned Hand, in Gregoire v. Biddle, 177 F.2d 579 at 581 (2d Cir. 1949), noted that without such immunity prosecutors would be forced to defend themselves on the merits in federal civil rights actions and such possibilities "would dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties."

The judicial process does not commence without the prosecutor and "[T]he public interest requires that persons occupying such important positions and so closely identified with the judicial departments of the government should speak and act freely and fearlessly in the discharge of their important official functions." (Yaselli v. Goff,

et al., 12 F.2d 396, 406 [2d Cir. 1926], aff'd per curriam in 275 U.S. 503; 48 S.Ct. 185; 72 L.Ed. 395 (1927).)

As in the case sub judice, since the proof of the pudding is in the eating, if you do not decide to make the pudding you need not worry about a stomachache from eating too much pudding, i.e., if a case is not filed, a prosecutor will not violate the civil rights of the prospective defendant. Thus a prosecutor, wary of his actions because of possible personal disadvantage to himself, may intentionally, or more likely unintentionally, tread too lightly upon the yolk of his duties lest he stain himself.

In the case sub judice, the petitioner Imbler seeks to eradicate the concept of "quasi-judicial" immunity previously accorded to prosecutors.[21/] While such a result may, perhaps, be of

21. The plethora of such cases is well documented in petitioner's brief (see, for example, p. 37, n. 2, of Brief for Petitioner). We consider the legal underpinnings of this doctrine and why its rationale requires its continued existence in Part II, infra, of this brief. Herein we consider some more aspects of the practical effect of the elimination of the doctrine.

benefit to Imbler, himself,[22/] the judicial

22. Of course, the benefit to Imbler is itself rather problematical. One of the reasons this Court deemed it necessary to adopt the exclusionary rule was because of its belief that the experience of California and other states proved such remedies as civil remedies for damages to be "worthless and futile." (Mapp v. Ohio, 367 U.S. 643, 652, 81 S.Ct. 1684, 1690, 6 L.Ed.2d 1081, 1088.) As recently noted by Chief Justice Burger:

> "The problems of both error and deliberate misconduct by law enforcement officials call for a workable remedy. Private damage actions against individual police officers concededly have not adequately met this requirement, and it would be fallacious to assume today's work of the Court in creating a remedy will really accomplish its stated objective. . . ." (Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388, 421, 29 L.Ed.2d 619, 641, 91 S.Ct. 1999, 2017 [dissent].)

If such causes of action are deemed ineffective in their result against police officers' purported violations of the Fourth Amendment, why should it be anticipated that they would be more effective in their result against prosecutors. (Of course, as is pointed out elsewhere in this brief, it is not the liability which is the real issue in this case, but rather the cost and harassment involved in defending the suit, as well as the

[footnote continued on next page]

process will not gain thereby. The cases initiated in the judicial process will be subjected to scrutiny as to their effect not only upon the judicial process, but also their effect upon subsequently initiated civil rights actions. The prosecutor will screen cases with, in effect, one hand[23] tied behind his back since each discretionary act on his part may later be subject to review. The judicial system will not have the benefit of impartial objective decisions by the prosecutor since he will,

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[footnote brought forward]
infringement upon discretionary acts which are part of the judicial process.)

Yet, even if such causes of action would turn out to be effective in rare instances, should the judicial process seek to clear rotten apples from the bushel by overturning the entire bushel? We have already noted that our system of jurisprudence has other means of regulating the corrupt prosecutor. (See pp. 18-19, supra.) Certainly, reversal on appeal or disbarment are Draconian measures which have an immediate effect upon only a limited class of prosecutors without affecting the entire judicial process.

23. Perhaps he will have even two hands tied behind his back if he can be sued for damages both for those cases he does not initiate, as well as for his actions in the cases he initiates.

in reality, have a personal stake in each case.[24] Thus, the quality of cases processed through the judicial system may suffer. Furthermore, judges may become concerned with the effect of their review of a prosecution for fear of subjecting the prosecutor to an unjust lawsuit. For example, if a court concludes that the evidence does not warrant prosecution and the prosecutor should never have initiated criminal proceedings, the defendant may now wish to sue the prosecutor for a violation of his federal civil rights. Thus, making a prosecutor liable may, in turn, affect the conduct of a judge who may become overly protective of the prosecutor, thereby impairing the judicial processing of criminal cases.

In short, while a particular defendant may be the beneficiary of a cause of action, the judicial process as a whole will not benefit if prosecutorial immunity is not retained since defendants, in general, and society would be worse off

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24. Cf. Ward v. Village of Monroeville, 409 U.S. 57, 93 S.Ct. 80, 34 L.Ed.2d 267 (1972), wherein the trial judge only had an indirect interest in the outcome.

Although the financial rewards of prosecuting attorneys thoughout the United States obviously varies from place to place, we suggest that no one would doubt that the average prosecuting attorney is not going to become a wealthy man by virtue of his period of public service. Courageous and conscientious men and women are needed in prosecuting offices and, if the shadow of personal financial loss ten or fifteen years in the future lurks behind their every prosecutorial move, the result in many cases may only be human nature, i.e., prosecutors will be extremely cautious in their approach to the matters brought before them.

There may be no way to foretell how many governmental entities throughout the United States would pay compensatory damages, based upon a civil rights suit, for a prcsecutor employed by it. But even assuming that many governmental entities would pay compensatory damages from their general tax funds if the verdict was against the prosecutor, nevertheless it is unlikely they would be as generous if

punitive damages were also assessed against the prosecutor. Our system of justice calls for "average people" to sit as jurors and in our law books we see a wide range of monetary judgments entered against defendants although on the record the facts of the cases seem almost identical. A perfect example of what we mean is that two persons charged with a crime might have their case severed. On almost identical evidence one jury might acquit one defendant and the other jury might convict the other. Triers of fact are given wide latitude and the basic concept being was there sufficient evidence to support the judgment. Corporations and wealthy citizens are rightly concerned about law suits because jurors might grant large judgments against them since it appears they have almost unlimited resources. Open season on prosecutors by prisoners who have all the time in the world to become litigious could easily create problems for prosecutors similar to those facing physicians today.

By analogy we note that doctors are facing tremendous costs for malpractice insurance and in many instances they cannot obtain such insurance at any cost. It may be that doctors can avoid the possibility of many malpractice suits by overpracticing, i.e., being extremely thorough in their examinations and treatment so that the likelihood of malpractice suits will greatly diminish. However, when we attempt to overpractice in the justice system, i.e., be more the number of prosecutions because we want the cases filed to be solid winners. Such "overkill" conservatism in order to avoid being sued can only have a detrimental effect on society because cases that should have been prosecuted were not prosecuted. The tide of crime cannot be stemmed in such a fashion.

Moreover, since a prosecutor works for an agency of the government, jurors might conclude the prosecutor himself would not ultimately have to pay the damages.[25/]

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25. But see pages 26-27, supra.

Regardless of the result of a civil rights action against a prosecutor, the effect on prosecutors can only be to hamstring their actions, for while they are prosecutors by profession, they have their personal lives and obligations and do not want to be a target for lawsuit after lawsuit.

While the preceding discussion may appear only to be aimed at career prosecutors, it is not our intent to protect only career people but all persons who, for whatever length of time, are prosecuting attorneys. Indeed, those persons who know they will not make a career out of being a prosecuting attorney probably are part of a group larger than that of career prosecutors. A prosecutor's office is mainly a trial-oriented office and thus many people passing the bar examinations want a few years of experience in trial work and the office of the prosecutor is a good place to get such experience. While it might be argued that a career prosecutor will not be overly concerned about a civil suit against him because he may feel that the government entity which employs him will

protect him from liability as long as the employment lasts, we submit that such an argument cannot stand up under close scrutiny for the non-carrer oriented prosecutor because in his eyes a claim that he violated a defendant's civil rights might occur five, ten or twenty years after he leaves the office of the prosecutor. While such a non-career prosecutor wants and obtains trial experience, we submit he will not want to lay the groundwork for a civil suit in the future and will be most cautious in his approach to processing cases. It is common knowledge that the prosecutor who turns to private practice does so because of supposed greener pastures. Indeed, the private practioner normally earns substantially more than the career civil servant and thus could expect to lose more if he loses in a civil rights action.

Approximately 14 years have elapsed since petitioner Imbler was charged with murder. Deputy District Attorney Richard Pachtman must now, if he is not immune from civil suit, come forward and defend some of the actions he took so long ago. The instant case was

one of great gravity since it involved a death penalty, but Richard Pachtman has processed innumerable cases since that time. Every prosecutor who has been at his job for as many years as Richard Pachtman has been at his job will have tried so many cases that to some extent the facts of the cases and the unreported portions of them, i.e., conversations with witnesses or facts relating to investigations, will merge, one upon the other.

Allowing the prosecuting attorney to be sued under the civil rights act for the intentional use of perjured testimony or for negligently allowing the use of perjured testimony is perhaps not the fact that will cause a prosecutor to be less than forceful and rigorous in his prosecution of criminals. We submit that a major problem which will affect prosecutors throughout the United States will be the possible loss of the civil rights action and the ultimate financial burden on the prosecutor and his family since the plaintiff in a civil rights action may sue the prosecutor for damages, both compensatory and punitive. (Donahue v. Staunton, 471 F.2d 475 [Cert.den. 410 U.S.

955], 482 [7th Cir. 1972]; Busista v. Weir, 340 F.2d 74, 87-88 [3rd Cir. 1965].)

2. Cost to governmental agencies.

Although the Office of the District Attorney of Los Angeles County employs more than 500 attorneys as deputies, we recognize that most prosecutorial offices in the United States are quite small. We can therefore see that if the deputies are tied up in civil litigation (answers, interrogatories, and the like), that time must come from somewhere. There is but so much working time in the day and logic indicates that if a prosecutor is being sued personally and must respond to a complaint or appear at a trial, he will probably delay the criminal cases assigned to him. Indeed, courts are normally open only during certain hours and, if the prosecutor is defending himself in one court, he cannot be a prosecutor in another court. One method to avoid the foregoing problems may be to hire more prosecutors, but that may not be economically feasible in the vast majority of small counties throughout the United States.

It is therefore clear that

defending civil rights actions to completion of the lawsuit may well require local government to incur the cost of attorneys fees to represent the alleged errant prosecutor in addition to the cost of employing additional prosecutors and secretarial help. Another cost to local government may be that of liability insurance if local government will protect their prosecutors. The taxpayer may have deep pockets but all good things must come to an end and if funds are lacking, the judicial system and all members of the public will also be lacking.

Perhaps the most important cost to government may be called the inhibiting effect on the judicial system. It cannot be measured in dollars and cents but it is, by far, the most costly because all of society suffers if vigorous prosecutions do not occur.

The need for hard-hitting, vigorous prosecutors, especially in the delicate areas of organized crime, anti-trust litigation, prosecutions against well-known public figures and any other sensitive area, should not cause a prosecutor to shy away from the legal battle because ultimately some fact finder, perhaps far in the future, might conclude that he

overstepped his bounds. Moreover, it is quite possible that cases which could cause prosecutors the most trouble in the area of civil suit litigation might be those of little publicity significance.

In the scheme of prosecutorial duties it is the average case, the case which did not receive much publicity, the case that may have taken but one or two days to complete the trial, which may ultimately be the subject of a civil rights suit against a prosecutor. How can a prosecutor protect himself from the shadow of a future lawsuit? It would seem that a prosecutor may have to keep an accurate diary of each of his cases to such a degree that he can readily refresh his recollection years later. This type of pressure can only have a debilitating effect on the morale of prosecutors and would certainly lessen the possibility that industrious and courageous young men and women would become career prosecutors.

Once again the judicial process would ultimately pay the cost since the lack of capable and vigorous career prosecutors can only impair the functioning of that process.

II

PROSECUTORIAL IMMUNITY IS DERIVED FROM THE IMMUNITY ACCORDED THE JUDICIAL PROCESS[26]

In order to properly examine and understand prosecutorial immunity we must find its origin.

In Yaselli v. Goff, supra, 12 F.2d 396 (2d Cir. 1926) the court traced the origin of immunity for the judicial process and found that immunity from civil suit was necessary for the proper independent function of judges (at pp. 399-402), "attorneys in the presentation of the client's case to the court or the jury" (at p 402), grand jurors (at p. 403), petit jurors (at p. 403), public officers in general (at pp. 403-404),

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26. Petitioner has not attempted in his brief to analyze the origin and meaning of judicial immunity and its relationship to prosecutorial immunity. He merely claims that the "quasi-judicial" immunity afforded prosecutors means that prosecutors seek to "occupy that exalted role assumed by judges" and that prosecutors because they are members of the executive branch of the government cannot be the beneficiaries of judicial immunity. (Brief for Petitioner, p. 53.) As we shall demonstrate herein, petitioner has misconceived the nature of prosecutorial immunity which is derived not from the judiciary, but from the judicial process.

the United States attorney (at p. 404), and a prosecuting attorney (at p. 404). Concerning the prosecuting attorney the court in Yaselli quoted from Watts v. Gerking, 111 Or. 641, 222 P. 318, 228 P. 135, where the court originally found the prosecutor liable civilly for maliciously commencing a prosecution but on rehearing reversed itself and stated in part:

> ". . . we are confronted with a determination that concerns public policy. We are face to face with a law-enforcing problem. Criminal law does not enforce itself. It demands the assistance of valid evidence and fearless officials to put it in execution" (12 F.2d at p. 405). (Emphasis added.)

In Haldane v. Chagnon, 345 F.2d 601, 603-604 (9th Cir. 1965) the history of judicial process immunity was also traced and the court found it "firmly and deeply planted in the field of Anglo American law." The Haldane court stated:

> "The principle is demanded by every reasonable consideration of public policy and has long endured. In Yates v. Lansing, 1810, 5 Johns, N.Y. 282, Chief Justice Kent, tracing the doctrine

> and finding that its origin could be seen at least as early as the time of Edward III, had this to say, 'It is to be found in the earliest judicial records, and it has been steadily maintained by an undisturbed currert of decisions in the English courts, amidst every change of policy, and through every revolution of their government. A short view of the cases will teach us to admire the wisdom of our forefathers, and to revere a principle on which rests the independence of the administration of justice.' The Congress has not said that in civil rights cases there may be intrusion upon the rule, and again quoting the learned Chief Justice Kent, 'Ought such a sacred principle of the common law, as the one we have been considering, to be subverted, without an express declaration to that effect?'
>
> "The Supreme Court of the United States has never retreated from early recognition of the compelling need of the doctrine. It held, in Bradley v. Fisher, 1871, 13 Wall. 335, 20 L.Ed. 646, that the principle of judicial immunity could not be undermined even

> by allegations that a judge's actions were motivated by corruption, malice, or other improper considerations. It said 'If upon such allegations a judge could be compelled to answer in a civil action for his judicial acts, * * * his office [would] be degraded and his usefulness destroyed, * * * '" (Haldane v. Chagnon, supra, pp. 603-604.)

We therefore submit that since Congress did not attempt to change the concept of immunity for the judicial process, that immunity so long established at the common law still exists.

The public is the beneficiary of immunity for the judicial process, not an individual judge, be he corrupt or not. (Pierson v. Ray, 386 U.S. 547, 554; 87 S.Ct. 1213, 1217-1218; 18 L.Ed.2d 288, 294 [1967].) That the test for immunity does not lie with judges alone but with the judicial process is also made clear in Donovan v. Reinbold, 433 F.2d 738, 743 (9th Cir. 1970). Certainly the trial setting in the case sub judice places the prosecutor in the performance of an act within the scope of his duties. (See Marlowe v. Coakley, 404 F.2d 70, 71 [9th Cir. 1968].)

Since prosecutorial immunity is derivative from immunity for the judicial process and since the purpose of immunity for the judicial process is to benefit the public (see Pierson v. Ray, supra) it follows that the purpose of prosecutorial immunity is to benefit the public, i.e., the judicial system as a whole.

In the effort to insulate the judicial process from outside influences it has long been recognized that the judge is not the only actor to be protected. Others share certain functions whthin the judicial process and those acts have been considered quasi-judicial acts. The quasi-judicial acts are an integral part of our judicial process and must be protected from outside influence just as judicial acts must be protected. (Bauers v. Heisel, 361 F.2d 581, 589-590 [3rd Cir. 1966], cert. denied, 386 U.S. 1021, 87 S.Ct. 1367, 18 L.Ed.2d 457 [1967].) One of the main actors on the stage of the criminal judicial process is the prosecuting attorney. The prosecutor has been given quasi-judicial immunity derivative from immunity for the judicial process. (Bauers v. Heisel, supra.) Indeed, even defense attorneys have been accorded such immunity. (Jones v. Warlick, 364 F.2d 828 [4th Cir.

1966].)[27]

An important distinction to be made in deciding whether immunity from civil suit should be granted a prosecutor is the determination of what is a judicial or non-judicial act. The dissent in the court below argues that, regardless of whether the act of the prosecutor is part of the judicial process, the prosecutor should not be able to hide behind such a label if his motivation in doing the act was improper. (Imbler v. Pachtman, 500 F.2d 1301, 1305-1306 [dissent], 9th Cir. 1974.) The majority in Imbler, supra, states that one should only examine the act itself, i.e., whether or not the act is within or without the judicial process, and not examine the prosecutor's motive. (See Tyler v. Witkowski, 511 F.2d 449 [7th Cir. 1974].) The view of the Imbler majority

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27. We recognize that one reason a defense attorney who is not employed by a governmental agency may have immunity is because he does not operate under color of law. However, we submit that another reason is that such immunity is derived from the judicial process and thus even those defense counsel who are employed by a governmental entity are immune. (French v. Corrigan, 432 F.2d 1211, 1214-1215 [7th Cir. 1970].)

is that, if motivation is the distinquishing factor, the purpose of judicial immunity would be undermined. Indeed, if motivation is considered, in reality that would be putting the proverbial cart before the horse since the issue of motivation does not arise if examination of the act makes the actor immune. If it is proper to consider motivation of the prosecutor, then the motivation of the judiciary is also subject to scrutiny since both the prosecutor and the judiciary are immune because of their role in the judicial process. Thus motivations of members of the judiciary would become subject to scrutiny contrary to the holding of this Court in Bradley v. Fisher, 13 Wall 335, 80 S.Ct. 335, 20 L.Ed. 646 (1872). There should be no doubt but that the presentation of a case before a court is part of the judicial process and thus, if a prosecutor must weigh his every word and act in the course of trial, the judicial process will be harmed immeasurably. It is only common sense that a civil suit, with or without merit, will inhibit the action of the person sued. A trier of fact may find liability many years after the event and perhaps only because the prosecutor could not marshal enough evidence so long after the fact.

Furthermore, in examining the Imbler dissenting opinion we submit it supports the majority opinion for at 500 F.2d 1306 the dissent states:

> "Not to be forgotten is the high responsibility accepted by a prosecuting officer when he enters upon the duties of his office. For example: (1) he is required to recognize that in our system of justice, the accused is to be given the benefit of all reasonable doubt; (2) his decisions during the course of the prosecution must be fair to all, including the defendant; (3) he has a duty of timely disclosure to the defense of all available evidence known to him that tends to help the defendant, and (4) it is his duty to seek justice, not pervert it by placing a conviction above the constitutional rights of the accused."

Of the four duties of the prosecutor as set forth above by the dissent, numbers (1), (2), and (4) are also duties of judges. Thus, if those duties do not require prosecutorial immunity, then the next step would be to destroy judicial immunity for they both play

a similar role[28] in the judicial process. It is this process from which both derive their immunity because of the necessity for the process of adjudication to be independently free from extraneous outside influence.

Both judges and prosecutors seek justice so that one form of the judicial system may survive. Judges, as well as prosecutors, are held to a high standard of conduct (Cannon 1, ABA Cannons of Judicial Ethics; Cannon 1, California Cannons of Judicial Ethics) but the judges' immunity would protect them from, for example as in the case sub judice, knowingly allowing a defendant to be convicted upon perjured testimony. Referring to judicial immunity in Pierson v. Ray, this Court

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28. "A prosecutor is called upon to determine, upon evidence submitted to him, whether a criminal offense has been committed by the person accused--exactly the same question that is presented to a court or jury upon trial. His decision is no less judicial in character if it be erroneous or swayed by prejudice or malice. It does not matter whether the evidence before him be much or little or whether he hears all or only some of it. His authority to investigate the facts before acting is unlimited and the matter rests in his own discretion. He is a quasi-judicial officer and he is also an executive officer." Pearson v. Reed, supra, 44 P.2d 592, 6 Cal.App.2d 277 (1935).

stated:

> "This immunity applies even when the judge is accused of acting maliciously and corruptly, and it 'is not for the protection or benefit of a malicious or corrupt judge, but for the benefit of the public, whose interest it is that the judges should be at liberty to exercise their functions with independence and without fear of consequences.' (Scott v. Stansfield, L.R. 3 Ex. 220, 223 (1868), quoted in Bradley v. Fisher, supra, 349, note, at 350.) It is a judge's duty to decide all cases within his jurisdiction that are brought before him, including controversial cases that arouse the most intense feelings in the litigants. His errors may be corrected on appeal, but he should not have to fear that unsatisfied litigants may hound him with litigation charging malice or corruption. Imposing such a burden on judges would contribute not to principled and fearless decision-making but to intimidation." (386 U.S. 554, 87 S.Ct. 12-18, 18 L.Ed.2d 294-295.)

Since both judges and prosecutors are part of the judicial process, they both must be

accorded immunity for the same acts.

CONCLUSION

For our system of justice to survive those intimately connected to the judicial process must be immune from the intimidating effect of civil suit for actions taken in the course of their official duties. This concept has been recognized for centuries and for the reasons set forth above should not be cast away.

Respectfully submitted,

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